IN THE

Supreme Court of the United States

October Term, 1971

Docket No. 71-1055

DEMOCRATIC NATIONAL COMMITTEE,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT AMERICAN BROADCASTING COMPANIES, INC. IN OPPOSITION

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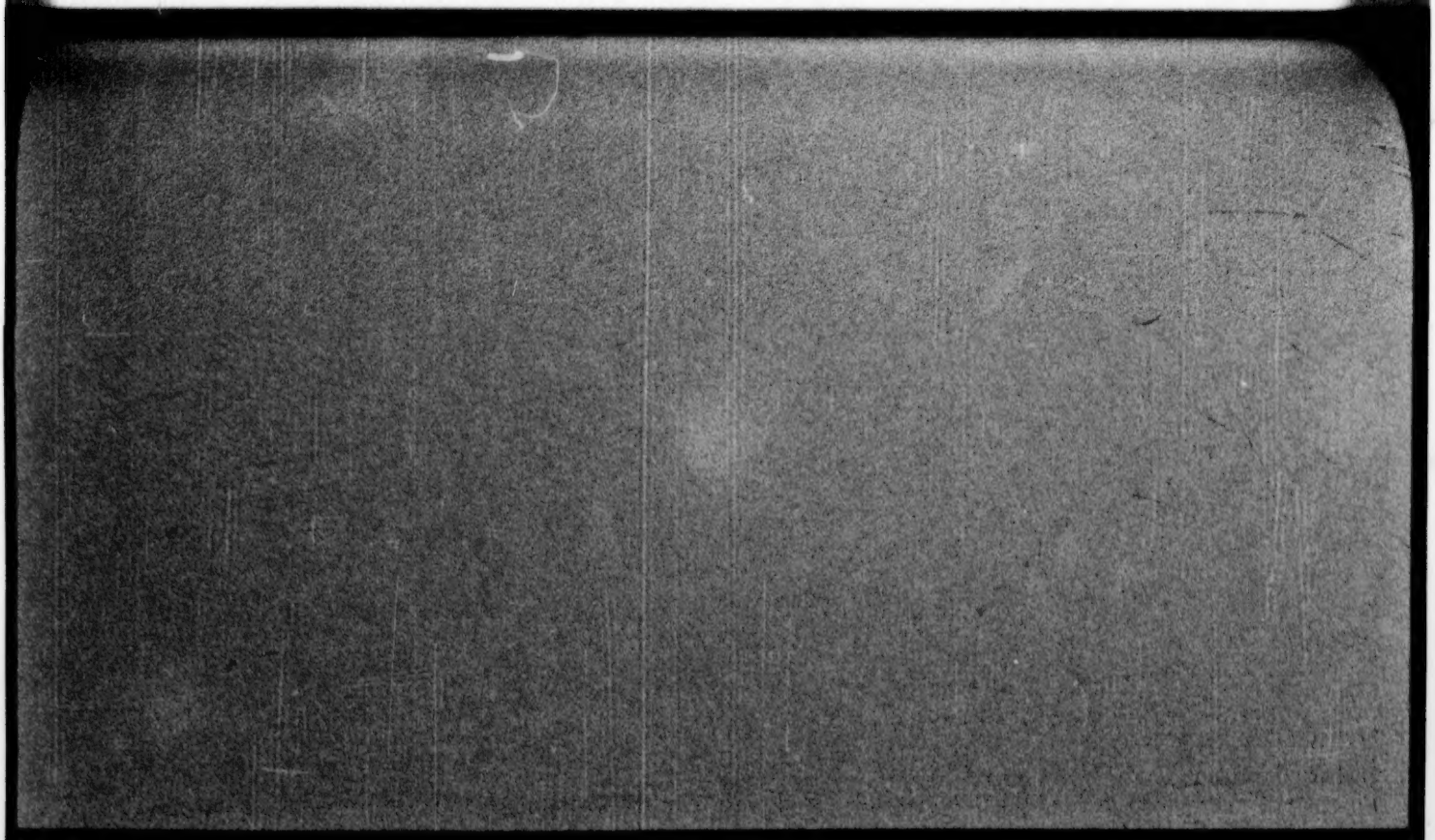

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IN THE

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OCTOBER TERM, 1971

Case No. 71-1405

DEMOCRATIC NATIONAL COMMITTEE,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT AMERICAN BROADCASTING COMPANIES, INC. IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals has not yet been officially reported. It is reproduced in Appendix A to the petition filed by the Democratic National Committee. The *Memorandum Opinion and Order* of the Federal Communications Commission is reported at 31 F.C.C. 2d 708 (1971) and is reproduced in Appendix C to the petition filed by the Democratic National Committee.

JURISDICTION

The judgment of the court of appeals affirming the decision of the Commission was entered on February 2, 1971. DNC Pet., App. B, p. 42a. The petition for a writ of certiorari was filed on April 28, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the court below erred in holding that the Federal Communications Commission[1] acted within its discretion by declining, in an *ad hoc* context, to promulgate a new rule which would pre-designate the opposition political party as the recipient of an automatic and equal time right of reply to broadcast appearances by the President of the United States?

2. Whether the court below erred in concluding that it is reasonable for the Commission to require that complainants in fairness doctrine cases assert more than vague and general allegations of unfairness and that, pursuant to this standard, the complaint of the Republican National Committee did not justify the correlative request that ABC be ordered to produce programming documents and logs?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent Constitutional and statutory provisions which ABC believes are involved include the First Amendment to the Constitution and Section 315(a) of the Communications Act of 1934. These provisions are set forth in the petition of the Democratic National Committee.

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[1] Hereinafter the "Commission" or the "FCC."

STATEMENT

Respondent American Broadcasting Companies, Inc. (hereinafter "ABC"), itself or through its subsidiaries, is the licensee of radio and television stations and operates radio and television networks. As such, ABC must continually make determinations as to what subject matter is to be transmitted over its facilities, including specifically news and public affairs programming. It is in the performance of this role that ABC presents important addresses of the President of the United States and invites the President and other national leaders to periodically appear in less formal discussion-type formats.

In this general context, the Democratic National Committee (hereinafter "DNC") requested the Commission to order ABC and the two other national television networks (CBS and NBC) to provide the DNC with free prime time programming for the presentation of views in opposition to those assertedly voiced during certain radio and television appearances of President Richard M. Nixon.[2] ABC and NBC had declined to accede to DNC's demand for free time to answer, respectively, a March 22, 1971, one-hour broadcast on ABC radio and television networks entitled "A Conversation with the President" and an interview with the President on the NBC "Today" show on March 15, 1971. In addition, both CBS and NBC denied DNC's request for time to answer a 20 minute Presidential address which was carried by all three networks on April 7, 1971, concerning the situation in Southeast Asia.

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[2] The various broadcast appearances involving the President are described in the lower court's decision. See DNC Pet., App. A, pp. 4a-5a. Two of the programs were interviews of the President by a single network correspondent (one on ABC and the other on NBC); the third program was a Presidential address on the Indochina War issue and was carried by all three networks.

ABC, however, determined that it would be appropriate to afford Democratic Party spokesmen an opportunity to discuss the Indochina War issue. Accordingly, ABC offered 30 minutes in prime time for the presentation of views in a format to be agreed upon in advance by DNC and ABC, and this offer was effectuated on April 22, 1971, when six Democratic Senators appeared on the ABC Television Network in a program entitled "Indochina— Another View."

The several DNC complaints filed with the Commission on April 13 and 14, 1971, rather than attempting to establish a violation of the Commission's general fairness doctrine, instead reiterated a pending request of the DNC for rulemaking in an outstanding Commission proceeding,[3] and claimed that notwithstanding the achievement of fairness and overall program coverage on the issues involved, the DNC was entitled to a specific right of reply to each individual Presidential appearance. In addition, DNC urged that past Commission holdings established that it should be given equal time to respond.[4]

In reply, each of the networks asserted that they were not *required* to provide specific response time to DNC, that the Presidential appearances in question were governed by the general fairness doctrine requirement that opportunity be provided for the presentation of contrasting viewpoints on controversial issues discussed by the

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[3] *In re Notice of Inquiry and Notice of Proposed Rule Making* in Docket No. 18859, 23 F.C.C.2d 27 (1970).

[4] The rulings relied upon DNC were *Letter to Nicholas Zapple*, 23 F.C.C. 2d 707 (1970) and *Republican National Committee*, 25 F.C.C. 2d 739 (1970) *rev'd sub nom. Columbia Broadcasting System, Inc.* v. *FCC*, 454 F.2d 1018 (D.C. Cir. 1971). In these cases the Commission had applied a "quasi-equal opportunities" approach to some broadcasts by political parties—i.e., if a station sells or gives time to one political party, it should sell or give comparable time to the rival party. Section 315(a) of the Communications Act, of course, only provides that "equal opportunities" be extended to opposing political *candidates*.

President and that, in this sense, fairness had been achieved.[5] The networks also stressed that the automatic right to reply to Presidential appearances proposed by DNC was not compelled by existing law—rather the present statutory framework *pre-designates* the counter spokesman on public issues only in the situation of bona fide political candidates.[6]

ABC stated that besides the April 22 broadcast by six Democratic spokesmen, views in contrast to those expressed by the President were given by Senator Mansfield after the State of the Union Address of January 22, 1971. In addition, ABC pointed out that in the immediately preceding period alone—from January to April, 1971—six Democratic spokesmen appeared on its public affairs program "Issues and Answers" and opposed the views of the President, whereas two persons appeared who favored his views. ABC also indicated that it had devoted significant time to views favoring and in contrast to those of the Administration in newscasts during the relevant period and in such programs as the "Dick Cavett Show".

The Commission held that such past decisions as *Letter to Nicholas Zapple, supra*, merely established the general proposition that, during election campaigns, it would be unreasonable for a licensee to refuse time to a political party or supporters of a political candidate after a licensee had given time to the supporters of an opposing candidate. The Commission refused to extend this ruling to broadcasts involving the President, determining to continue to apply the general principles of the fairness doctrine to Presidential appearances rather than carving out

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[5] In this regard, showings were made that contrasting views had been presented as to the issues raised in the three specific Presidential appearances in question as well as with respect to other recent appearances by the President.

[6] 47 U.S.C. § 315(a).

a new corollary which would lodge an automatic right of reply with the opposition political party. The Commission further found that the network companies had not violated their fairness doctrine obligation to present contrasting views to those expressed by the President and that, accordingly, the evidentiary hearing requested by DNC was unnecessary.

In the same opinion, the Commission denied a related complaint filed by the Republican National Committee (hereinafter "RNC") directed against ABC. This complaint stemmed from ABC's decision not to accede to RNC's demand for free broadcast time to respond to ABC's April 22 program featuring six Democratic Senators.[7] Furthermore, without any documentation of its own, RNC claimed that, in deciding to present the April 22 program involving six Democratic Senators, ABC had not given consideration to views presented by guests on ABC's late evening "Dick Cavett Show". Thus, RNC urged the Commission to compel ABC to provide "any logs and other documents" demonstrating "the time used on ABC during the period February 8 to April 8, 1971, for the discussion of various viewpoints on the Indochina issue." DNC Pet., App. A, p. 49a. On this point, the Commission held that ABC should not be required to provide detailed documentation of its public issue program-

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[7] As to this fairness doctrine aspect of the RNC complaint—a matter which is not covered by the DNC petition—the Commission ruled that, in light of the fact that a reasonable opportunity had been provided for the presentation of contrasting views on the Vietnam war, ABC had met its fairness obligation and was not compelled to provide the RNC, *qua* political party, with time to specifically respond to what RNC characterized as a previous partisan presentation of the DNC. DNC Pet., App. C, p. 54a. The lower court similarly refused "to sanction the commencement of an unending circle" of political party appearances, remarking that "[s]hould we grant RNC an opportunity to respond to DNC we would embark upon a course of request after request." DNC Pet., App. A, p. 23a.

ming in response to a bare, unsupported allegation of unfairness. DNC Pet., App. A, p. 55a.

On petitions for review, the court of appeals unanimously affirmed the Commission's ruling. The Commission's application of its fairness doctrine to Presidential appearances on the broadcast media (DNC Pet., App. A, pp. 14a-28a), as well as certain procedural policies generally applicable to fairness doctrine situations (DNC Pet., App. A, pp. 29a-40a), were found to be reasonable exercises of agency discretion which did not violate the First Amendment. Further, the court held that the Commission's findings were fully supportable, within its statutory authority, and not "arbitrary, whimsical, or capricious." DNC Pet., App. A, p. 41a.

ARGUMENT

In attempting to persuade this Court to grant plenary review of the lower court decision, DNC has merely muddied an otherwise unambiguous path. Stripped to its essence, the DNC petition is a strained effort to surround the lower court opinion with a heightened significance that is unfounded on the record before both the Commission and the court of appeals.

Rather than the artificial dimensions DNC would draw, the lower court opinion merely affirms long-held Commission policies concerning the coverage of controversial public issues, and determines that those policies had been rationally and fairly applied in this particular case. Accordingly, absent any finding of abuse of discretion, the court appropriately declined to substitute its judgment for that of the agency specifically created by Congress and entrusted with the decisional responsibility to fashion such policies. See *National Broadcasting Co.* v. *FCC*, 319 U.S. 190 (1943); *FCC* v. *Schreiber*, 381 U.S. 279 (1965); *Udall* v. *Tallman*, 380 U.S. 1 (1965).

Particularly indicative of the shallowness of the questions presented by the DNC petition is the apparent effort to conceptually link this case with a pending consolidated proceeding before this Court.[8] Unlike here, however, that proceeding involves an entirely new interpretation and extension of the First Amendment as applied to broadcasting. This case, in contrast, represents merely the dispute of a private party as to how *existing* policies in one particular circumstance (Presidential media appearances) should be applied. Moreover, the issues that DNC raises are irrelevant to the question of an affirmative First Amendment right of paid access to the broadcast media for public issue announcements during broadcast advertising time—the issue at stake in the cited pending cases.

The Petitioner also casts the lower court opinion in an aura of undue significance by associating the unique qualities and responsibilities of the Office of the Presidency with what it asserts is the special effectiveness of the electronic media in the political process. While there is little doubt of the pervasive qualities of radio and television as disseminators of information, DNC's assertions as to the particular degree of interrelationship between the attributes of the Office of the Presidency and the effectiveness of the media are mere speculation. Surely the Office of the Presidency is unique in our political structure,[9] but a recognition of this fact may well diminish rather than enhance DNC's position that broadcast appearances by the *elected* leader of the nation

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[8] See *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, No. 71-863, consolidated with *FCC* v. *Business Executives Move for Vietnam Peace*, No. 71-864; *Post-Newsweek Stations, Capital Area, Inc.* v. *Business Executives Move for Vietnam Peace*, No. 71-865; and *American Broadcasting Companies, Inc.* v. *Democratic National Committee*, No. 71-866.

[9] See, *e.g.*, P. Herring, *Presidential Leadership* (1940) p. 12; G. McConnel, *The Modern Presidency* (1967) pp. 15, 35.

should be automatically "balanced" by the appearance of the opposition political party. In sum, simple conjecture as to the effectiveness of the broadcast medium in the formation of public opinion is obviously an inadequate basis on which to proceed to initiate new requirements with respect to the use of that medium by the nation's Chief Executive.[10]

I. There Is No Significant Question That Would Warrant Review By This Court.

It is noteworthy that not only the Commission and the court below, but the parties, including DNC, apparently agree on the First Amendment principle involved. For instance, DNC stresses that the relevant First Amendment goal in this context is to produce an informed public and to preserve broadcasting as a forum for robust, uninhibited and wide-open debate of public issues. DNC Pet., pp. 13-14. The real dispute framed, therefore, merely centers on DNC's claim as to how this objective should be interpreted and implemented.

The lower court held that public discussion would be inhibited if Presidential broadcast appearances were all pre-designated—irrespective of the content and nature of the appearances—for an equivalent response by the opposition political party, since the President would thereby restrict his use of television. DNC's assertion that this is an "unsubstantiated fear that cannot justify abridgement of First Amendment rights" (DNC Pet., p. 15) is totally misplaced. Rather, a plain reading of the lower court's opinion is that DNC's proposal to create an automatic right of reply to all Presidential appear-

[10] For a view that contemporary advocates of expanded and individualized media access may be misled in assuming too great a power of television to develop political consciousness, see Jaffe, *The Editorial Responsibility of the Broadcaster: Reflections on Fairness and Access*, 85 Harv. L. Rev. 768, 769-71 (1972).

ances would indeed abridge First Amendment interests. In DNC's twisted view of the lower court decision, however, it is said that the ultimate result means that only the President's voice and views will be heard on political issues and that the public will be denied the exposure to competing viewpoints essential to an informed electorate. DNC Pet., p. 15. This is totally inaccurate since the Commission and the lower court clearly affirmed the applicability of the fairness doctrine to Presidential appearances to insure that contrasting views to those of the President are presented on the broadcast media.

In essence, DNC really is left to suggest that it, as the opposition political party, does not obtain the broadcast exposure that *it* determines necessary and appropriate. In other words, the real question at issue is one of degree in which DNC asserts that—irrespective of the exposure of Democratic spokesmen on an appropriate rather than an automatic basis and the full and fair treatment of issues discussed in Presidential appearances—it is entitled to an additional special organizational right that is fully comparable to the President's broadcast media exposure.

In DNC's opinion, review is warranted because the court below and the Commission have applied the fairness doctrine so as to "defeat the doctrine's role of assuring that the listeners and viewers will be adequately exposed to contrasting viewpoints on controversial issues of public importance." (DNC Pet., p. 16). In point of fact, the Commission and the court below have construed the fairness doctrine in a manner that is fully consistent with this Court's interpretation of the First Amendment purpose of that doctrine in its leading *Red Lion*[11] case. DNC simply fails to acknowledge that the basis for the Commission's ruling and the court's decision below was

[11] *Red Lion Broadcasting Company* v. *FCC*, 395 U.S. 367 (1969).

that acceptance of DNC's position would result in a degradation of the vital First Amendment interests underlying the fairness doctrine and would frustrate the objective of insuring that listeners and viewers are adequately exposed to all contrasting viewpoints on significant issues of public importance.

It is undisputed that the fairness doctrine is fully applicable to the discussion of controversial issues during Presidential appearances.[12] Accordingly, Presidential appearances on broadcast stations involving the discussion of public issues, under present procedures, invoke an obligation on the part of such licensees to present the viewpoints of contrasting spokesmen.

In the traditional operation of the fairness doctrine, however, this has allowed licensee discretion in determinning the schedule and format of such presentations—including, particularly, flexibility in selecting the appropriate spokesmen for such views rather than their predesignation.[13] DNC suggests that the court below refused to "come to grips" with its central argument and was "reluctant to disturb the unchecked discretion" lodged with broadcasters under the fairness doctrine. DNC Pet., pp. 18-19. This sort of characterization simply will not comport with the plain language of the court of appeals decision. The court fully comprehended the nature of DNC's request and, more importantly, the im-

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[12] See *Letter to Blair Clark*, 11 F.C.C. 2d 511 (1968); *aff'd sub nom. McCarthy* v. *FCC*, 390 F. 2d 471 (D.C. Cir. 1968); *Committee for the Fair Broadcasting of Controversial Issues*, 25 F.C.C. 2d 283 (1970); *Republican National Committee*, 25 F.C.C. 2d 739 (1970), *rev'd sub nom. on other grounds, Columbia Broadcasting System, Inc.* v. *FCC*, 454 F. 2d 1081 (D.C. Cir. 1971).

[13] For instance, in this case ABC demonstrated that it had achieved fairness through regular newscasts, regularly scheduled public affairs programming and by means of special events public affairs programming—including a variety of contrasting spokesmen.

plications of its effectuation. Correctly applying the rationale of this Court's decision in *Red Lion*, the court of appeals found that to implement the abstract proposal of DNC would constrict rather than promote the public's First Amendment right to hear views that contrast with those of the President on important public issues. As the court noted, treatment of Presidential broadcast appearances under the fairness doctrine generates "robust, wide-open debate" and the goal of an informed electorate by allowing and encouraging "the discussion and presentation of controversial issues in various broadcast formats (e.g., newscasts, interviews, documentaries)." [14]

In contrast, DNC's proposal of an automatic equal time response to Presidential appearances would necessarily confine the discussion to one format and one counter spokesman. In the lower court's view, the basic principle underlying the fairness doctrine and its treatment in *Red Lion* to insure that the public is adequately informed could be achieved by more appropriate means:

> "At times the President speaks to crucial problems to which . . . groups [other than DNC] are far more qualified to speak. DNC and its representatives have no greater claim to expertise in the area of the economy than the National Chamber of Commerce or the president of the New York Stock Exchange, and that is the point; crucial issues must be reasonably aired after consideration of the viewpoints of all significant factions. This is a matter for licensee discretion and not automatic rule because the speaker is the President of the United States. If DNC were correct in their contentions, this illusory First Amendment right would extend right of response to addresses by state governors and city mayors." [15]

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[14] See DNC Pet., App. A, p. 24a, quoting from *Committee for the Fair Broadcasting of Controversial Issues, supra*, 25 F.C.C. 2d at 292.

[15] DNC Pet., App. A, p. 36a.

Consequently, both the Commission and the court of appeals recognized that DNC's proposal would not necessarily advance the goal of an informed electorate. DNC has merely suggested an alternative policy based on the debatable rationale that the President, by virtue of his position, is capable of dominating the broadcast media at will and thereby shaping and limiting the content and focus of national debate on significant public issues. Rather than skirting this issue as DNC suggests, the court of appeals met the problem head on:

> "As to the contention that without this automatic right only the voice of the President is heard, clearly we can only say that while this may be a persuasive debate argument, we question its validity here. Daily all of the media—not merely broadcast media—carry stories, articles and reports by opponents to the President, from the opposition party as well as his own party. In this nation, the varying viewpoints are available to any person seeking to hear or read them. A citizen desiring to be informed need only pick up a newspaper or news magazine, flick on his radio, or tune in his television. Information indicative of all viewpoints is available merely for the seeking. We see no need for supplementation based on some theoretical right in the First Amendment which at best has gone undefined in this litigation.[16]

Ignoring this perspective, DNC continues to insist that by the use of the televised address the President is able to obtain "instant concensus on his programs and policies" and there is seldom a "single focal point of opposition." (DNC Pet., p. 17). That the President is able to achieve an "instant concensus" would probably come as a surprise to *any* Administration and is surely pure

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[16] DNC Pet., App. A, pp. 36(a)-37(a).

supposition on DNC's part as to either the impact of the media or the persuasiveness of the Chief Executive.[17]

In sum, the Commission and the court below have merely adhered to the system of broadcast regulation approved by Congress, implemented by the Commission through such policy mechanisms as the fairness doctrine, and approved by this court in *Red Lion*. That system turns on a concept of public stewardship whereby individual licensees are obligated to inform the public of contrasting views on significant public *issues* in a variety of formats and by multiple speakers rather than pursuant to an equal time approach which would designate a single opposing spokesman. Moreover, in this particular instance the record reflects that this procedure of devoting substantial amounts of news discussion, commentary and interview programs to views contrasting those of the President was followed. In addition, ABC specifically provided spokesmen from the Democratic Party with free time for their use to air views contrasting those of the President on the Indochina War issue. Consequently, DNC seeks review of a decision which is fully consistent with prior interpretations of the fairness doctrine and the teachings of this Court in *Red Lion* as to the application of the First Amendment to broadcasting. As the court of appeals noted, "DNC asks [the court] to give birth to a new corollary [to the fairness doctrine]. We are not the body to pass on such a request." [18] In conclusion, the court emphasized that there

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[17] *See generally*, J. Klapper, *The Effects of Mass Communications* (1960); Hovland, *Effects of the Mass Media of Communication*, in MASS MEDIA AND COMMUNICATION 447-82 (C. Steinberg ed. 1966).

[18] DNC Pet., App. A, p. 41a. In so ruling, the court, of course, followed a long line of cases holding that a court's purpose on review is to determine whether the agency order is unreasonable or in contravention of statutory purpose and not to substitute its discretion for that of the administrative agency. See *American Telephone and Telegraph* v. *U.S.*, 299 U.S. 232, 236 (1936). In

are more appropriate forums for the advocacy of completely new standards.[19]

II. Commission Procedures for Processing Fairness Doctrine Complaints Foster Rather Than Infringe First Amendment Rights.

DNC asserts that the court of appeals approved certain procedural standards which would deny fairness doctrine complainants "procedural fairness". These include (1) the court's acceptance, as reasonable, the Commission's standard that complainants establish "detailed and specific evidence of failure to comply with the requirements" of the fairness doctrine and (2) the court's affirmation of the Commission's refusal to order ABC to make available its logs and other programming materials for a determination of whether a "requisite balance" in public affairs programming had been achieved.[20]

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short, where Congress and the responsible agency have struck one balance rather than another this Court has repeatedly cautioned against the temptation of judges to become "super legislatures" whether under the aegis of the Constitution or through conventional judicial review. *Ferguson* v. *Skrupa*, 372 U.S. 726, 731 (1963); *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423 (1952); *62 Cases of Jam* v. *U.S.*, 340 U.S. 593, 600 (1951). More specifically perhaps, as this Court noted in *Red Lion, supra*, 395 U.S. at 381 (1969), the FCC's interpretation of the fairness doctrine is entitled to "great weight" and should be followed unless there are "compelling" indications that it is wrong.

[19] DNC Pet., App. A, p. 41a. As illustrative of the court's point, Congress has several times revised the Communications Act of 1934 to give statutory recognition to the fairness doctrine, amend the equal time requirement, and for other objectives. See, *e.g.*, 66 Stat. 717 (1952 amendments); 73 Stat. 557 (1959 amendments); and 86 Stat. 3 (1972 amendments). Equally pertinent, the very subject matter of the DNC's concern is currently being considered as part of an outstanding Commission proceeding. *In re the Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act*, 30 F.C.C. 2d 26, 33-34 (1971).

[20] DNC Pet., pp. 19-20. Significantly, although the court's ruling was limited to an *ad hoc* request for documentation as to ABC,

DNC's procedural contentions similarly place it in the bare posture of merely asserting that the Commission should be judicially directed to drastically modify existing procedures to conform with DNC's view that a divergent approach is "more appropriate". As the court below found, the Commission has long maintained a policy of refusing to require licensees, in the normal course, to engage in laborious searches and collections of documents to affirmatively prove adherence to the fairness doctrine when a complainant has done no more than allege general unfairness.[21]

Based on decades of experience, the Commission has adopted the view, which was affirmed by the court below, that such time-consuming searches would deter the proper handling of day-to-day broadcast operations, could be subject to abuse and would generally not be conducive to uninhibited debate. For this reason, the Commission

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DNC now appears to claim that the court failed to actually fashion a rule of general applicability in this regard. Before the lower court, DNC's procedural contentions were restricted to the following aspects: (1) the timeliness of the Commission's decision, (2) the burden of proof on fairness doctrine complainants, and (3) the Commission's failure to hold an evidentiary hearing on DNC's claims. See DNC Pet., App. A, p. 37(a). Thus, the present contention regarding the need for routine production of "logs and other programming materials" to constantly demonstrate fairness was not specifically raised below by the DNC. Rather DNC merely expressed support of an *ad hoc* request of the Republican National Committee (RNC) to order ABC to make "logs and other documents" available to satisfy RNC's speculation as to whether ABC had considered certain "non-news type" programming in determining whether fairness had been achieved on a particular issue. Moreover, RNC has not sought review of the lower court's decision. Indeed, based on the representation that ABC had indeed considered the "Dick Cavett Show" (See page 6, *supra*) in determining fairness, counsel for RNC verbally advised the court of appeals at oral argument that RNC was no longer pressing this issue.

[21] *Allen C. Phelps*, 21 F.C.C. 2d 12, 13 (1969); *Applicability of Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598, 600 (1964); *Robert G. Ryan*, 25 F.C.C. 2d 884, 885 (1970).

has implemented certain minimal and reasonable standards which the complainant in a fairness doctrine context must normally meet before the agency will act upon such a complaint.[22] For example, the Commission has merely determined that it will not act upon the merits of fairness complaints absent some showing that the licensee involved acted unfairly in covering a particular issue.

In this specific case, the court found that it was not only appropriate to place the *initial* burden in such instances with the complainant rather than the licensee, but that DNC had failed to meet that burden in this proceeding. DNC Pet., App. A, p. 38a.[23] In this Court, DNC goes beyond the general burden of proof issue and now argues that in being denied regular and general access to certain undefined programming materials of broadcast licensees, fairness doctrine complainants are refused "the only available source of 'specific and detailed evidence' of a broadcaster's coverage of controversial issues of public importance," DNC Pet., p. 20.[24] During the con-

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[22] See *Applicability of Fairness Doctrine in the Handling of Controversial Issues of Public Importance, supra*, 40 F.C.C. at 600. There are, however, no formal rules that inflexibly govern such situations.

[23] It should be noted that the court below ruled on this point even though it initially found that DNC had failed to preserve the burden of proof issue for review because it had not raised the claim before the Commission. Pet. App. A, pp. 37(a)-38(a). This procedural deficiency is, of course, compounded by the fact that the further claim for logs and other programming documentation was a claim in the court below unique to the RNC, not the DNC.

[24] DNC's speculation that monitoring of the programming of the three networks would be an insurmountable undertaking is greatly misleading. DNC Pet., p. 21. First of all, the impression that continual monitoring on all issues and as to all programs (including the vast bulk of entertainment, sports and similar programming) is necessary is simply spurious. Generally, any monitoring that was necessary could be limited to regularly scheduled news and public affairs programming. Furthermore, experience dictates that others

siderable period the Commission has administered the fairness doctrine it has processed thousands of legitimate complaints which have been successfully raised without resort to "logs and program material". Furthermore, the Commission's experience simply will not support the additional assertion that the effect of the court's ruling on these procedural matters—which does no more than affirm long-standing practices—will be to discourage fairness doctrine complaints by those wishing to present their views on controversial issues. Certainly the recent trend in fairness complaints has been toward a steady escalation and there is no discernible evidence that rejections of fairness complaints on this ground have correspondingly increased.[25]

It is also important to emphasize that the fairness doctrine procedures utilized by the Commission by no means represent an absolute prohibition against requesting the production of program documentation by broadcasters in certain instances. In other words, although on infrequent occasions and in particular circumstances the Commission may request such support materials,[26] it

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have been successful in monitoring the efforts of broadcasters—for fairness doctrine purposes, as well as for challenges to license renewals and other objectives. For instance, a recent survey of the contemporary scene remarks that "[l]icense challengers and civic action groups *monitoring* radio and television, rarities in the past, became commonplace." Alfred I. duPont—COLUMBIA UNIVERSITY SURVEY OF BROADCAST JOURNALISM 1970-1971, p. 4 (1971).

[25] For example, whereas complaints alleging fairness doctrine violations numbered 409 in 1962, the yearly total had increased to 1,736 in 1970. See 28TH ANNUAL FCC REPORT (1962) pp. 44, 52 and 36TH ANNUAL FCC REPORT (1970) p. 62.

[26] See, *e.g.*, *In re Complaint of Democratic National Committee Against NBC, CBS and ABC*, 33 F.C.C. 2d 631, 633-35 (1972), on appeal to the United States Court of Appeals for the District of Columbia Circuit, *Democratic National Committee* v. *FCC*, No. 72-1314.

has more commonly followed the general procedure of not requiring such documentation since to do so would forestall rather than foster the robust debate that the fairness doctrine attempts to achieve. Consequently, for most purposes—upon a threshold finding that a fairness doctrine complainant has satisfied the minimal pleading standards [27]—the Commission has found it adequate and desirable to process legitimate fairness complaints on the basis of the licensee's written representation as to his treatment of the issue in question, and has not generally required the further submission of such background materials as transcripts, tapes, logs, etc.

The DNC petition is, therefore, characterized by a feeble attempt to cloak the lower court decision in artificial significance and to effectuate a substitution of its own policies for those of the Commission. However, as the court below found, the Commission's policies are neither unreasonable nor in contravention of statutory purpose. They are of long-standing origin, based on a statutory mandate and represent an affirmation rather than a departure from the First Amendment principles applicable to broadcasting articulated by this court in *Red Lion*.

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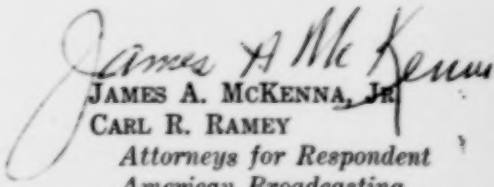
[27] "Where complaint is made to the Commission, the Commission expects a complainant to submit specific information indicating (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) the basis for the claim that the station has presented only one side of the question; and (5) whether the station had afforded, or has plans to afford, an opportunity for the presentation of contrasting viewpoints." *In re Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance*, 40 F.C.C. 598, 600 (1964). See *Hale* v. *FCC*, 425 F.2d 556, 559 (D.C. Cir. 1970); *Cf. Dorothy Healey* v. *FCC*, D.C. Cir. No. 24,630, decided March 3, 1972, *Slip Op.*, p. 9.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,



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